

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDITH A. HARVEY
Claimant

VS.

UNITED METHODIST YOUTHVILLE
Respondent

AND

ROYAL & SUN ALLIANCE
Insurance Carrier

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Docket No. 262,511

ORDER

Respondent and its insurance carrier appealed the September 12, 2003, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on March 2, 2004.

APPEARANCES

R. Todd King of Wichita, Kansas, appeared for claimant. Michael P. Bandre of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

On both September 29 and October 4, 1999, claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

In the September 12, 2003, Award, Judge Barnes concluded claimant sustained a 19.5 percent functional impairment to her right lower extremity as measured by the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.). In arriving at that conclusion, the Judge averaged the eight percent functional impairment rating to the right lower extremity provided by Dr. Philip R. Mills with the 31

percent rating to the right lower extremity provided by Dr. Pedro A. Murati. The Judge, however, did not utilize the five percent functional impairment rating to the right lower extremity provided by Dr. Anthony G. A. Pollock as the Judge concluded Dr. Pollock did not utilize the *Guides*.

Respondent contends Judge Barnes erred. Respondent argues Dr. Pollock used the *Guides* to measure claimant's functional impairment. As the degenerative changes in her right knee did not neatly fit within the diagnosis-related estimates (DRE) tables, the doctor, therefore, used his experience in determining claimant's functional impairment. Accordingly, respondent argues it was "extremely unreasonable" for the Judge to disregard Dr. Pollock's functional impairment rating "because of a variance in his application of the *Guides*."¹ Finally, respondent contends the credible evidence establishes claimant has sustained, at most, an eight percent functional impairment to the right lower extremity.

Conversely, claimant contends the Award should be affirmed. Claimant argues the Judge was correct in concluding Dr. Pollock did not utilize the *Guides* in measuring claimant's functional impairment but, instead, used his experience and personal opinions.

The only issue before the Board on this appeal is the amount of functional impairment claimant sustained to her right lower extremity as a result of her September and October 1999 work-related accidents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The September 12, 2003, Award should be modified.

The parties stipulated that claimant, on both September 29, 1999, and October 4, 1999, sustained personal injury by accident arising out of and in the course of her employment with respondent. The only issue presented to the Judge was the nature and extent of claimant's injuries and disability that arose from those accidents.

The record contains the opinions from three doctors regarding the functional impairment claimant sustained as a result of her two work-related accidents.

Dr. Anthony G. A. Pollock, who is an orthopedic surgeon, performed arthroscopic surgery on claimant's right knee in January 2001 after diagnosing mild degenerative

¹ Respondent's Brief at 7 (filed Nov. 6, 2003).

arthritis. Although Dr. Pollock testified claimant sustained a five percent functional impairment rating to her right lower extremity as measured by the *AMA Guides* (4th ed.),² the doctor also testified the rating was based on his experience and opinions in general. The doctor testified, in part:

Q. (Mr. King) Do you cite to a specific DRE table for your five percent?

A. (Dr. Pollock) I'm not sure how I arrived at that, I think it was the best -- the closest thing I could get to in the *AMA Guide*, which was probably a combination of the --

(REPORTER'S NOTE: At this time a brief recess was taken for a phone call; whereupon, the following proceedings were had:)

A. Where was I?

Q. The DRE table for your rating.

A. The DRE table, yes, and I was looking for my book. On the degenerative changes of the joint, if you have narrowing, there is a table for the amount of narrow spaces, and I don't believe that she was that narrow, so I had to sort of compare her to a meniscus and that's how I kind of fudged out and got it that way.³

. . . .

Q. As we sit here today, do you believe that your August 1, 2001 letter accurately represents your opinions even after seeing her through December 12th, 2002?

A. Well, I'm sure she's probably degenerated a little further, if you were to look, though I do think her x-rays don't show anything there. Let me get the book, I had it with me not long ago. I don't know what I did with it. If she had a meniscectomy, she'd be four percent of the whole body or ten percent of the lower extremity. And I don't -- she's probably somewhere in there. She has loss of cartilage, which I don't demonstrate here on those standing films, if she would be even a minimal loss of cartilage, would only be three percent, be seven percent to the lower extremity, so she's -- yeah, I mean you might fudge it up to seven percent, but that would be about it, somewhere in there, I mean based on the presumption that it's worse.

Q. Did you --

² Pollock Depo. at 7.

³ *Id.* at 11-12.

A. There is a DRE, let me see if I can find the wretched thing, which is a little bit different. And which I confess I use very seldom because it's pretty broad.

Q. Page 81, Table 62 perhaps?

A. Very good, sir. Thank you.

Q. Is that right?

A. Well, no; page 81? Different version, that's a different thing, this is the loss of articular cartilage on page 81, Table 62, that's different. Sorry, I --

Q. While you are looking, that actually parlays into my next question, is yours based on a DRE table or based on just your experience and opinions in general?

A. The latter.⁴

Claimant presented the testimony of Dr. Pedro A. Murati, whom claimant's attorney hired to evaluate claimant for purposes of this claim. Dr. Murati, who regularly performs medical evaluations and who practices in the areas of pain management and electrodiagnosis, examined claimant in October 2001 and diagnosed claimant as having right knee pain status post medial femoral condyle debridement with moderate crepitus. Combining ratings for weakness in extending and flexing the right knee with a rating for debriding the right medial femoral condyle, Dr. Murati rated claimant as having a 31 percent functional impairment to her right lower extremity. Dr. Murati said this impairment rating was arrived at pursuant to the *AMA Guides* (4th ed.). The Board notes the doctor extrapolated numbers from the *Guides'* Table 62 in rating the impairment for the debridement.⁵

Dr. Philip R. Mills, who practices physical medicine and rehabilitation and who evaluated claimant at the Judge's request, also provided an opinion regarding claimant's functional impairment. Dr. Mills examined claimant in September 2002 and diagnosed degenerative arthritis of the medial femoral condyle in claimant's right knee. Using the *AMA Guides* (4th ed.), Dr. Mills rated claimant as having an eight percent functional impairment to her right lower extremity. On pages 6 and 7 of his September 4, 2002 letter to Judge Barnes, the doctor wrote, in part:

Permanent Impairment Evaluation: Based on The Fourth Edition of the American Medical Associations's Guides to the Evaluation of Permanent Impairment, she

⁴ *Id.* at 14-15.

⁵ Murati Depo. at 8.

[claimant] would have an impairment that could be determined three different ways by the *Guides*.

- If range of motion is used she would have an 8% permanent partial impairment for the loss of flexion and the increased valgus.
- If the thigh atrophy was used she would also have an 8% permanent partial impairment.
- If the crepitation was used she would have a 5% permanent partial impairment.
- The range of motion and the thigh atrophy agree well and it would appear to me that she would have an 8% permanent partial impairment to the left *[sic]* lower extremity. This would be causally related to the injury sustained on 09/30/99 *[sic]* to a reasonable degree of medical probability.

After carefully considering the three doctors' opinions, in this instance the Board is persuaded by Dr. Mills' analysis of claimant's functional impairment. Rather than being hired by any party, the Judge requested Dr. Mills to provide an unbiased opinion independent of the influence from the parties. Furthermore, Dr. Mills' opinion appears most consistent with the objective findings obtained by the various doctors and the *Guides*. Consequently, the Board finds and concludes claimant is entitled to receive permanent disability benefits for an eight percent functional impairment to the right lower extremity.

AWARD

WHEREFORE, the Board modifies the September 12, 2003, Award and grants claimant permanent disability benefits for an eight percent functional impairment to the right leg.

Judith A. Harvey is granted compensation from United Methodist Youthville and its insurance carrier for a September 29, 1999, accident and an October 4, 1999, accident and resulting disability. Based upon an average weekly wage of \$597.72, Ms. Harvey is entitled to receive 9.31 weeks of temporary total disability benefits at \$383 per week, or \$3,565.73, plus 15.26 weeks of permanent partial disability benefits at \$383 per week, or \$5,844.58, for an eight percent permanent partial disability to the leg, making a total award of \$9,410.31, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director